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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 52

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACME INDUSTRIAL COMPANY, ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 129–133) is reported at 351 F. 2d 258. The Board's decision and order (R. 26–33) are reported at 150 NLRB 1463.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1965 (R. 134). The petition for a writ of certiorari was filed on January 4, 1966, and was granted on February 21, 1966 (R. 135; 383 U.S. 905).

[1] On May 2, 1966, this Court entered an order permitting Amalgamated Local 810, International Union, United Automobile, Aerospace and Agricultural Workers of America, AFL–CIO, the charging party before the Board, to intervene as a party in this proceeding.

The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. Sec. 160(e)).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, and the Labor-Management Relations Act are set forth in the Appendix, *infra*, pp. 35–38.

QUESTION PRESENTED

Whether the existence of grievance and arbitration machinery in a collective bargaining agreement deprived the Board of power to determine whether the employer had violated the National Labor Relations Act by refusing to furnish the Union with information necessary to its administration of the agreement.

STATEMENT

In April, 1963, at the conclusion of a strike, the Company (a manufacturer of tools and metal products) and the Union (see n. 1, *supra*) entered into a collective bargaining agreement covering the employees at the Company's Laflin Street plant in Chicago. The contract contained two substantive provisions relevant to this case. Under Article I, Section 3 (R. 27, 96), the Company agreed "not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company."

Article VI, Section 10 (R. 27, 102), provided that, "[i]n the event the equipment of the plant or of any department * * * is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority * * *." The contract also contained procedures for the processing of grievances, culminating in a provision for binding arbitration (R. 98–100). A grievance was defined as "a difference of opinion with respect to the meaning and application of the terms of this Agreement" (R. 98).[2]

On or about January 8, 1964, the Union discovered that machinery was being moved from the Lafiin Street plant. Its stewards asked foremen why the machinery was being removed and where it was being relocated. The foremen replied that there had been no violation of the contract and that the Company, therefore, was not obliged to furnish this information. (R. 27; 64–67, 70–72).[3] Thereafter, between January

[2] The subcontracting clause (Article I, Section 3) also specifically provided (R. 96) that a violation thereof "will be subject to the grievance procedure." In describing the arbitrator's authority, the agreement provided that he may not "change, alter, detract from or add to the provisions of this Agreement, * * * his authority being limited to the interpretation of the terms of this Agreement" (R. 100).

[3] For example, Rudolph Rich, the Union's vice president and a steward, asked Foreman Steelhammer "if he would give me, as a union representative, the information that we were aware of the fact that machinery was being moved out of the plant

13 and March 3, 1964, the Union invoked the initial steps of the grievance machinery with regard to eleven grievances charging that the Company, by removing machinery from the plant and by subcontracting the work previously performed on those machines, had violated the recognition, subcontracting, and work-transfer clauses of the contract (R. 27; 109–123, 44).[4]

On April 3, 1964, the president of the Union wrote a letter to the Company requesting information concerning the date on which each piece of equipment was moved out of the plant; the place to which the equipment was moved and whether such place was a facility owned or controlled by the Company; the number of machines or equipment moved; the reason or purpose of the move; and whether the equipment was used for production elsewhere. The letter asserted that this information was "essential to the Union for the servicing and administration of the current contract." (R. 27–28, 21–22; 124). By letter of April 16, 1964, the Company declined to furnish

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which without this information forthcoming we were unable to continue—or even originate the filing of a grievance" (R. 64). Steelhammer, after checking with the Company's industrial relations manager, advised Rich that "the Company felt that they were not in violation of the contract and, therefore, they did not feel compelled to give the Union any definite answer as to why the machinery was moved or where" (R. 65).

[4] Many of the grievances alleged that the Company's action had deprived employees of job rights and employment (see R. 109, 111, 112, 119). Between April, 1963, when the Company resumed operations after the strike, and the Board hearing in August, 1964, the number of employees in layoff status ranged from 30 to over 75. In addition, employment at the plant dropped from about 190 to 115. (R. 60–61.)

this information, on the ground that "[w]e are aware of no layoffs nor of any reductions in any classification within five (5) working days prior to your letter" (five days being the time within which grievances relating to layoffs were required to be filed under the collective agreement, see R. 100), that the Union had "available all the information [it needed] to determine whether or not any employees' rights are being violated," and that its questions were "indicative of a fishing and harassment expedition" (R. 28, 22–23; 125–126).

The Union then filed unfair labor practice charges with the Board, alleging that the Company's refusal to furnish the requested information constituted a refusal to bargain collectively in violation of Section 8(a)(5) of the National Labor Relations Act. A complaint was issued on these charges. (R. 2–8.)

The Board held that the Act had been violated.[5] It found first that the information sought by the Union was relevant to the Union's administration of the agreement as statutory representative because such information was "necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meri-

[5] The trial examiner initially recommended that the complaint be dismissed (R. 17–25). Although recognizing that the issue before him was "a matter of policy for the Board and not an examiner to decide," the examiner ruled that "I would not hold that the Respondent has committed an unfair labor practice by withholding information where the dispute has been contemplated by the parties in making their contract and binding arbitration has been established to resolve that dispute" (R. 24–25).

torious, and whether to press for arbitration. The denial of such information deprives the Union of an opportunity to know whether jobs and machinery have been moved out of the plant under circumstances entitling employees, especially those in layoff status, to follow the jobs or entitling the Union to grieve over improper subcontracting." The Board then found that the contract contained no "clause by which the union waives its statutory right to such information. The mere existence of a grievance machinery terminating in arbitration is not to be construed as a waiver of the Union's statutory right to such information." (R. 29.) The Board concluded that the bargaining obligation imposed by Section 8(a)(5) of the Act had been violated (*ibid.*) and it ordered the Company to provide the Union, on request, with "information concerning the removal of equipment and machinery from its plant" (R. 30–31).

On cross petitions to review and to enforce the Board's order, the court of appeals denied enforcement and set aside the order (R. 129–133). The court did not upset the Board's finding that the requested information was relevant to the Union's performance of its statutory representative function, nor did it dispute the Board's conclusion that the Union had not expressly waived its statutory right to such information. The court ruled, however, that the existence in the collective bargaining agreement of a provision for binding arbitration of differences concerning the meaning and application of that agreement precluded the Board from exercising its ordi-

nary unfair labor practice authority here. In the court's view, "[t]he factors bearing on a determination of the relevancy of the information requested are interrelated with a construction and application of the contract provisions. The latter is a matter exclusively reserved for the arbitrator" (R. 132).

ARGUMENT

THE GRIEVANCE AND ARBITRATION PROCEDURE IN THE COLLECTIVE BARGAINING AGREEMENT DID NOT PRECLUDE THE BOARD FROM FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) OF THE ACT BY REFUSING TO FURNISH THE UNION WITH INFORMATION NECESSARY TO THE PROPER PERFORMANCE OF ITS REPRESENTATIVE FUNCTION

Introduction and Summary

The question in this case is whether the Board may find that an employer has failed to bargain in good faith under Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) by refusing to furnish the union with information necessary to the proper performance of the union's statutory representative function under a collective bargaining agreement when that agreement contains grievance and arbitration machinery for resolving differences over "the meaning and application of" its terms. The court of appeals held the exercise of the Board's power to be precluded and has remitted the Union to whatever remedy may be afforded to it through arbitration. We disagree with this incursion into the

Board's statutory responsibility to enforce the provisions of the Act.[6]

We start with two premises regarding the meaning of the National Labor Relations Act, both of which we believe to be common ground here. First, we believe it to be unquestioned that the duty to bargain imposed under Section 8(a)(5) of the Act does not ordinarily terminate with the execution of a collective bargaining agreement, but continues through the life of the agreement. Parties must thus administer questions arising under the contract—no less than questions relating to the formation of a contract—consistently with the principles of the Act. *Conley* v. *Gibson*, 355 U.S. 41, 46; *J. I. Case Co.* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7). Were any confirmation of this principle needed, it is explicitly provided by Section 8(d) of the Act (29

[6] The question in this case is, to some extent, related to the question presented in No. 53, O.T., 1966, *National Labor Relations Board* v. *C & C Plywood Corp.* Like the issue here, the question in No. 53 concerns the power of the Board to resolve unfair labor practice disputes related to provisions of existing collective bargaining agreements. In this case, however, as we show *infra*, the Board may resolve the statutory unfair labor practice controversy without, in fact, resolving any issue of contract interpretation which would be within the function of an arbitrator to decide, while in No. 53 a contract interpretation issue was concededly relevant to the Board's statutory determination. On the other hand, the contract in No. 53, unlike the contract here, did not contain grievance and arbitration procedures for resolving differences in contract interpretation. While we urge in both cases that the Board's statutory power was not precluded, we agree that because of these differences, separate consideration of the issues in the two cases is appropriate.

U.S.C. 158(d)) which defines the duty to bargain imposed by Section 8(a)(5). The definition of Section 8(d) expressly includes, not only the duty to "confer in good faith with respect to * * * the negotiation of an agreement," but also the duty to confer subsequently with respect to "any question arising thereunder."

Our second premise—which we also believe to be unquestioned here—is that the duty to bargain thus imposed ordinarily includes the duty to furnish information needed in order to permit the other party to statutory bargaining—either before or after a contract is concluded—to discharge its functions intelligently and effectively. This Court has expressly so held with regard to information requested in the course of contract negotiations (*National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149),[1] and the same principle has also been applied in numerous cases with regard to information relating to the administration of existing agreements (*National Labor Relations Board* v. *Woolworth Co.*, 352 U.S. 938, reversing, 235 F. 2d 319 (C.A. 9); *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956 (C.A. 5), certiorari denied, 350 U.S. 836; *J. I. Case Co.* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied, 349 U.S. 905; *Boston Herald-Traveler Corp.* v. *National Labor Relations*

[1] See, also, *e.g.*, our brief in opposition in *Sylvania Electric Products, Inc.* v. *National Labor Relations Board*, No. 373, O.T., 1966.

Board, 223 F. 2d 58 (C.A. 1)). We take it as established, therefore, that a party who refuses to supply such information despite a proper request is ordinarily in default of its statutory obligation to bargain in good faith and has committed an unfair labor practice.

The present case involves a request for information relating to the bargaining process after a contract had been concluded. The parties to the agreement here—respondent and the Union, a local of the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO—entered into a collective bargaining agreement covering one of respondent's several plants. This agreement (R. 95–108) contained two substantive provisions central to the Union's request for information. One provision (Article I, Section 3) provided that "[i]t is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company" (R. 96). The other (Article VI, Section 10) provided that "[i]n the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority * * *" (R. 102).

Some months after the collective bargaining agreement containing these provisions had been executed, the Union discovered that machinery was being re-

moved from the plant covered by the agreement. (The fact that machinery was, in actuality, removed is not contested.) Such removal of machinery could potentially—depending upon the place to which the machinery was removed and the use made of it there—constitute a violation of one or both of the quoted provisions; if the machinery was removed to a subcontractor, Article I, Section 3, might be violated, and if it was removed to another plant owned by respondent without giving employees a right to transfer to that plant, Article VI, Section 10 might be violated. The Union's role in the administration and supervision of the agreement—including its role in processing grievances on behalf of particular employees who might be adversely affected by any violations of the two provisions—was thus directly involved.[8] In these circumstances, the Union sought information regarding the place to which each piece of machinery had been removed and the use which was being made of it in that place; ultimately, these requests were embodied in a letter written to respondent. (R. 124.) Respondent in all cases refused to give the requested information (R. 27–28, 125–126.)

The Board found that the respondent had thereby violated Section 8(a)(5) of the Act. Applying the

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[8] The Union's role in processing grievances, including the exclusive right to invoke the final stages of the grievance procedure as well as the exclusive right to invoke binding arbitration, is set out in Article IV of the contract (R. 98–100). In this case, the grievance procedure had in fact been invoked by the Union in eleven instances growing out of the transfer of machinery, by the time the Union's request for information was incorporated in a formal letter (R. 111–123).

two principles noted above, the Board ruled that "[i]t is clear that Section 8(a)(5) of the Act imposes an obligation upon an employer to furnish upon request all information relevant to the bargaining representative's intelligent performance of its function." The refusal to furnish information here violated these precepts because it deprived "the Union of an opportunity to know whether jobs and machinery have been moved out of the plant under circumstances entitling employees, especially those in lay-off status, to follow the jobs [under Article VI, Section 10] or entitling the Union to grieve over improper subcontracting [under Article I, Section 3]." While the Board recognized that the statutory right to such information might be waived by the Union through the contract, it noted that the contract contained no express waiver and it held that "[t]he mere existence of a grievance machinery terminating in arbitration is not to be construed as a waiver of the Union's statutory right to such information." (R. 29.)[9]

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[9] It is settled law that a waiver of statutory rights will not be inferred, but must be clear and unmistakable. See, *e.g.*, *National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488 (C.A. 1); *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836; *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2); *Fafnir Bearing Co.* v. *National Labor Relations Board* (C.A. 2), June 17, 1966, 62 LRRM 2415, 2419. This rests on the theory that, since a provision protecting a statutory right "would normally be implied in an agreement by operation of the act itself" (*National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488, 489

The court of appeals disagreed with neither of the legal premises upon which the Board's decision had been based, *i.e.*, that the statutory duty to bargain ordinarily exists with relation to the administration and enforcement of a collective bargaining agreement and that that duty ordinarily includes the duty to furnish relevant information to the statutory bargaining representative; nor did it find erroneous the Board's finding of fact that the information requested in this case by the Union was, in fact, relevant to the performance of its statutory representative function. The court, moreover, did not contest the Board's finding that no provision of the collective agreement in this case constituted either an express or an implied waiver in fact of the Union's ordinary right to such information.

The court, however, ruled that the Board's decision had not properly taken into account an additional factor which, in the court's view, displaced the Board's normal unfair labor practice authority here. This factor was the presence in the collective agreement of grievance and arbitration provisions under which differences with respect to the meaning or application of the subcontracting and work transfer provisions of Article I, Section 3, and Article VI, Section 10, were subject to final and binding arbitration. The court believed that "[t]he factors bearing on a determination of the relevancy of the information requested are interrelated with a construction and application

(C.A. 1)), that protection can be lost only by express action. See also *Cloverleaf Division of Adams Dairy*, 147 NLRB 1410, 1413–1414.

of those contract provisions" and the latter was "a matter exclusively reserved for the arbitrator" by the contract (R. 132). In these circumstances, the court held that "Board intervention to make the determination of relevancy in the light of its independent interpretation of the meaning and application of the contract provisions contravenes the policy expressed in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, concerning the priority which should be accorded the grievance and arbitration procedures and machinery provided for in the contract," as well as "the national policy embodied in Section 203(d) of the Labor-Management Relations Act (29 U.S.C.A. § 173) that '[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement'" (R. 132–133).

This decision was, we submit, erroneous. In the first place, the Board's unfair labor practice decision here did not, in fact, depend upon the Board's resolution of differences between the parties concerning the meaning or application of the substantive provisions of the collective bargaining agreement. The respondent in this case has not sought to justify its refusal to furnish the requested information by reliance upon a construction of Article I, Section 3, or Article VI, Section 10, different from that asserted by the Union, and no such question was presented to or decided by

[10] The Company has merely attempted to show that no employees were laid off or otherwise adversely affected as a result

the Board. Nor did the Board's decision involve a disputed application of those provisions; it held only that the Union was entitled to the requested information in order intelligently to decide whether to raise a question of application in arbitration.[10] In these circumstances, we think it plain that the Board's decision could not in any way interfere with the statutory and judicial "policy of effectual achievement of contractual arbitration." On the contrary, as we shall show, the Board's decision of the unfair labor practice question in such a case actually facilitates the grievance and arbitration process under the agreement, while the contrary decision would constitute a serious hindrance to the proper functioning of that process.

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of the machinery removal and the subcontracting (Opposition to Petition for Certiorari 3–4, 6; see also the Company's letter refusing to furnish the information, R. 125–126). While these facts would bear on the merits of any grievance which the Union might choose to press through the grievance and arbitration machinery, we think it obvious that the Union's statutory right to information relating to whether subcontracting or machinery removal had occurred did not depend upon the Union's first establishing that employees were, in fact, adversely affected by such actions. In the first place, it would be impossible for the Union to determine that, for example, subcontracting had caused a particular layoff or a diminution of the work available in the plant without knowing whether subcontracting had, in fact, occurred; nor could the explanation which the Company might offer for a layoff or work reduction be evaluated without the Union's having knowledge of whether subcontracting or machinery removal had occurred. In addition, we think it clear that the Union, as part of its representative role in the administration of Article I, Section 3 and Article VI, Section 10, would have a right to know whether subcontracting or machinery removal had occurred, whether or not layoffs or work reductions had yet taken place as a consequence. See *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 69–70 (C.A. 3).

Secondly, we believe that, even if respondent here had invoked an arbitral difference over the meaning or application of the contract as a reason for refusing to supply the information requested by the Union, the court was wrong in ruling that the Board's statutory authority to find and remedy an unfair labor practice was thereby absolutely precluded.[11] Again, the exercise of the Board's unfair labor practice power in order to inform the union prior to initiation of arbitration will ordinarily aid, rather than hinder, the arbitral process. Nor need the Board, in exercising its statutory authority, in fact determine the arbitral issue between the parties; the Board's decision may rest solely on the basis that the union's contentions are substantial, and that it ought to be afforded the information relevant to the development of those contentions. On the other hand, the assertion of insubstantial contract contentions should certainly not be given the effect of precluding Board jurisdiction to require good faith bargaining. Finally, the Board's power in these circumstances, despite the existence of an arbitration provision, is directly supported by explicit statutory language in Section 10(a) of the Act.

In sum, we take no issue in this case with the strong policy, relied upon by the court of appeals, favoring the arbitral solution of labor disputes when the applicable collective bargaining agreement provides for

[11] The question whether the Board has power to act on an unfair labor practice charge that involves a threshold issue of contract interpretation is directly presented in a companion case, *National Labor Relations Board* v. *C & C Plywood Corp.*, No. 53, this Term. See footnote 6, *supra*, p. 8.

such arbitration.[12] In this case, however, we submit that the Board's decision in no respect collided with that policy while, at the same time, the Board has supported the efficient functioning of arbitration procedures as the applicable policy requires by requiring the production of relevant information prior to the initiation of the arbitration process.

A. NO ARBITRAL ISSUES WERE PRESENTED TO THE BOARD IN THIS CASE; THE BOARD'S POWER WAS THEREFORE PLAINLY NOT PRECLUDED BY THE ARBITRATION AGREEMENT

The Board, in finding an unfair labor practice here, was not called upon to perform any function of contract interpretation subject to arbitration under the arbitration clause of the collective agreement. Under that clause, an arbitral grievance is "a difference of

[12] See *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593. *American Mfg.* and *Warrior Gulf* were suits to compel arbitration of grievances, and *Enterprise Wheel* was a suit to enforce an arbitrator's award. In all three cases, the employer claimed that, while there was an arbitration clause in the collective agreement, he had not agreed to arbitrate the particular questions involved, and therefore the court should decline to order arbitration or (in *Enterprise Wheel*) to enforce the arbitrator's award. This Court held that, since arbitration is a desirable process for the resolution of disputes over the interpretation of labor agreements, the courts should not assess the merits of the grievance in determining arbitrability, but instead should order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, *supra*, 363 U.S. 574, 582–583.

There is nothing in these decisions which purports to limit the Board's remedial authority under the NLRA. See *Lodge 743, Machinists* v. *United Aircraft Corp.*, 337 F. 2d 5, 10–11 (C.A. 2), certiorari denied, 380 U.S. 908.

opinion with respect to the meaning and application of the terms of this Agreement" (R. 98). No such difference respecting the two provisions of the agreement here involved—Article I, Section 3, and Article VI, Section 10—existed between the parties in this case in regard to the Union's request for information.[12a]

Article I, Section 3, and Article VI, Section 10 (R. 96, 102) make it a violation of the contract for the respondent to move machinery either to a subcontractor or to another plant owned by respondent where such movement would deprive employees covered by the agreement of any work. As we understand its position, respondent does not argue—nor could it tenably so argue under the plain contractual language—that such movements of machinery are left to its unilateral control under these provisions.[12b] The restrictions placed by the contract upon the Company in this regard are thus clear; and the Union's role under the contract in enforcing those restrictions is also undisputed.[13] In these circumstances, it seems unquestionable that, while the Union's request for information pertained to the administration of the two contract provisions, no issue regarding contract meaning was presented by that request. Rather, the differ-

[12a] The Company, of course, disputed the "application" of the clauses in the sense that it urged, and still urges, that they have not been violated. The Board plainly did not decide this question, but merely required the production of information so that the Union could intelligently decide whether, and how, to take these questions to arbitration.

[12b] See also footnote 2, *supra*, p. 3.

[13] See footnotes 8 and 10, *supra*, pp. 11, 14–15.

ence between the parties related to the Union's right to secure information which would indicate to it whether the clauses had been violated.

When the Board upheld the unfair labor practice claim, therefore, it did not decide, nor did it need to decide, any difference between the parties over the meaning or application of Article I, Section 3, Article VI, Section 10, or any other contract provision.[14] The only dispute which the Board resolved was a statutory dispute over the information which Section 8(a)(5) of the National Labor Relations Act requires an employer to furnish a union in the course of the administration of a collective bargaining agreement. As

[14] It is true that, hypothetically, an employer in a case such as this one, while not disagreeing with the union over the meaning of any substantive contract provision, might point to a provision of the contract dealing with the grievance procedure under which it might contend that the union had waived its normal statutory right to secure information relating to potential grievances. Conceivably, for example, the grievance provisions of a particular contract might explicitly deny the union the right to such information in connection with procedures which placed the prosecution of certain grievances solely in the hands of the employee involved, rather than the union. Should such a contract provision exist, the meaning or applicability of which was the subject of a difference of opinion between the parties, an arbitrable question of contract interpretation would be presented and the analysis in the latter part of this brief, *infra*, pp. 27–34, would become pertinent.

In the present case, however, respondent relied on no such contract provision in refusing to furnish the requested information, nor did such a provision exist in the agreement. As the Board noted (R. 29), "the contract does not contain a clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the union waives its statutory right to such information."

noted above, *supra*, pp. 8–12, we believe that the Board clearly resolved this statutory question consistently with established principles regarding the meaning of the duty to bargain under the Act as it relates to the obligation to supply information.

If the foregoing analysis of the issue before the Board in this case is correct, it is evident that the Board's power should not have been deemed precluded by any actual or potential conflict with the arbitration remedy under the contract. No arbitral issue relevant to the request for information existed and, consequently, no conceivable conflict with an arbitrator's function was present. Should the Union ultimately decide to carry the dispute to arbitration, the Board will have decided no issues which will be presented to the arbitrator. The Board's decision, for example, does not preclude the Company from urging in arbitration that machines were not removed to a given place, that such removal did not violate the contract, or that employees were not entitled to complain because work opportunities were not lost. We now show, in addition, that the Board's exercise of power in cases like the present one not only does not conflict with subsequent arbitration, but actually considerably facilitates the arbitral process.

Arbitration is usually the last, as well as the most costly, step in a contractual grievance procedure. Thus, the procedure prescribed by the collective bargaining agreement in this case (see R. 98–100), which is typical, had four steps: (1) the employee, his

steward, and his foreman first attempt to adjust the grievance; (2) if the matter is not satisfactorily settled, the steward then submits the grievance in writing to the Union's shop committee and representatives of the Company's industrial relations department; (3) if there is still no satisfactory settlement, the Union may "appeal" to the company's industrial relations department; and (4) after these steps have been exhausted, the Union may take the grievance to an arbitrator selected by the Union and the Company from a panel provided by the Federal Mediation and Conciliation Service; the Company and the Union each pay half the expenses of the arbitrator.

This procedure plainly contemplates that many, if not most, grievances will be disposed of at the early stages of the grievance procedure—short of formal arbitration—either because investigation by the union shows them to be without merit or enables the union to persuade the employer that some adjustment should be made, or because the union, for other valid reasons, decides not to press the grievances.[15] Furnishing the union with information pertaining to a grievance at these earlier stages clearly effectuates this process because it enables the union to make an intelligent decision on whether and how to process the grievance.

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[15] For example, the experience of the United Steelworkers of America and the United Automobile Workers under their contracts with United States Steel and General Motors, respectively, shows that most grievances have been "settled"—*i.e.*, granted, compromised, or dropped—in the lower steps of the grievance procedure, short of arbitration. See the *amicus* brief of the AFL-CIO, submitted in support of the petition for certiorari in *Vaca* v. *Sipes*, No. 114, This Term, pp. 4–5, certiorari granted, 384 U.S. 969.

By precluding the Board from finding the refusal to furnish information to be an unfair labor practice, on the other hand, the decision of the court of appeals would mean that, if the employer so chooses, information pertaining to a grievance could only be obtained from an arbitrator after the decision to press for arbitration had been made. The union would therefore frequently have to decide whether to utilize the grievance and arbitration machinery without an adequate opportunity to determine whether the grievance involved had any merit; indeed, the union would often be forced to exhaust the entire grievance and arbitration mechanism in order to find out whether a grievance should have been brought at all. As a result, some insubstantial grievances would be fully pressed through the contractual machinery (where, with adequate information, they would have been abandoned); some meritorious grievances would be pressed to arbitration with the union groping through the proceeding inadequately prepared; and the union would also undoubtedly be forced, because of the substantial cost involved, to abandon many grievances which adequate information might, in fact, have shown to be meritorious. The net result would be to clog arbitration procedures and make them more cumbersome, protracted, and expensive than heretofore, as well as seriously to impair the union's statutory right to information pertinent to its representative function. "If the union is entitled to the information, it is entitled to have it well in advance of any arbitral hearing to enable it to decide whether

to grieve or continue to press an unresolved grievance for use in grievance discussions with management representatives and in preparation for arbitration. Even if these needs could be met by a continuance granted at the [arbitration] hearing—and they cannot—the resultant delay and encouragement of litigation would seriously impair the statutory right." Lesnick, *Arbitration as a Limit on the Discretion of Management, Union, and NLRB: The Year's Major Developments*, Proceedings of New York University Eighteenth Annual Conference on Labor 25–26 (BNA 1966).[16]

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[16] See *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71 (C.A. 3): "Demands for information are usual precursors to the submission of complaints and grievances to grievance and arbitration machinery. This is only natural, for * * * unions would be forced to grope blindly through the early stages of the grievance procedure unless adequate information were preliminarily available." Accord: *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 753 (C.A. 6), certiorari denied, 376 U.S. 971. See also *Fafnir Bearing Co.* v. *National Labor Relations Board*, (C.A. 2), decided June 17, 1966, 62 LRRM 2415, 2419. In holding that the union was entitled to conduct its own time studies to verify those conducted by the company, notwithstanding that the arbitrator would also be authorized to conduct such studies, the court said:

> The reason the Union desired to make "live" tests was not to usurp the function of the arbitrator and thereby interfere with standard grievance procedures; it was needed, instead, to determine whether to take the grievances to arbitration in the first place. By preventing the Union from conducting these studies, the Company was, in essence, requiring it to play a game of blind man's bluff. Only by guess-work could the Union determine which piece rates to protest and which to accept. Of course, the Union always had the option of demanding that *all* griev-

Nor is it an answer to suggest that the union might apply to an arbitrator in advance of instituting grievances and obtain an order compelling the production of the information sought. In the first place, it is not at all clear that the arbitrator ordinarily has such powers. He is not "a judge ruling on pre-trial discovery motions. The arbitrator sits for the determination of disputes unresolved by the grievance machinery but he is not the administrator of that machinery." Lesnick, *Arbitration as a Limit on the Discretion of Management, Union and NLRB, supra,* at 25; see also *Timken Roller Bearing Co.* v. *National Labor Rela-*

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ances on proposed piece work prices be reviewed by the arbitrator; but that alternative obviously would be impractical, expensive and indeed strifebreeding * * *. [Footnote omitted.]

The arbitration process has recently been criticized on the ground that proceedings have become too expensive, protracted and complicated. See Fleming, *The Labor Arbitration Process*, 30, 57-58 (Univ. of Ill., 1965). Moreover, concern has been expressed over the growing backlog of arbitration cases and it has been suggested that the backlog is due, in part at least, to the fact that there are "poor investigative procedures on the part of union representatives, or an unwillingness to screen grievances carefully." See the comments of Arbitrator David H. Stowe at the New York University 19th Annual Conference on Labor, 61 LRR 243, 245 (April 25, 1966). See also Ross, *Distressed Grievance Procedures and Their Rehabilitation*, in Labor Arbitration and Industrial Change, 16th Annual Meeting, National Academy of Arbitrators 104 (BNA, 1963). See also *Collins Radio Co., Texas Division*, 36 LA 815 (arbitrator unable to determine claim that employer had assigned bargaining unit work to non-unit employees because the evidence produced was incomplete; the deficiency was due to the fact that the union had been denied access to the plant for the purpose of investigating the grievance).

tions Board, 325 F. 2d 746, 751–754 (C.A. 6), certiorari denied, 376 U.S. 971. These doubts regarding an arbitrator's power to supervise the grievance machinery seem especially strong in the case of a typical contract, like the one at bar, which does not establish a permanent umpire or arbitrator, but which provides that the arbitrator be chosen *ad hoc* when a dispute arises and the grievance mechanism is exhausted. An arbitrator is, in addition, usually without the power of subpoena to compel production of information. The proposed United States Arbitration Act, for example, drafted by a committee of arbitrators, does not include a provision for subpoenas. See *Challenges to Arbitration*, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators 164 (BNA, 1960); see also Fleming, *The Labor Arbitration Process* 175 (Univ. of Ill. 1965); Elkouri, *How Arbitration Works* 181–182 (BNA 1960). Finally, even where an arbitrator is able to, and does, pass on an information request, he must determine it under the particular requirements of the contract and therefore may not be free to take into account the relevant statutory considerations.[17]

[17] Thus, in *Bethlehem Steel Co.*, 31 LA 423, the union claimed that the employer violated the contract by failing to provide a job classification for each employee along with the seniority list; the arbitrator found that, since the employer provided each employee with his job classification, the contract was not violated, there being no requirement that the information be furnished to the union; however, the arbitrator declined to pass on the question whether the NLRA would have imposed a different requirement on the employer. The arbitrator indicated that "to base his decision on his construction of the law, as in-

In these circumstances, we believe it evident that the Board properly held in this case that it had power to find that the Company had committed an unfair labor practice by refusing to furnish the Union with requested information necessary to the Union's proper performance of its representative functions. The Board's decision enhanced the arbitral process while it created no possible displacement of the arbitration agreement.[13]

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terpreted by NLRB, rather than on his understanding of the Agreement between the parties," would "bring him perilously close to exceeding the authority" granted by the Agreement. *Id.*, at 426. Similarly, in *Natvar Corp.*, 24 LA 753, the union asked for written descriptions of each employee's job; the arbitrator ruled that, since there was no provision in the contract respecting such job descriptions and there was no "past practice" on the matter, he was without authority to compel the production of that information. And, in *Spartan Mills*, 27 LA 256, the union asked for seniority lists, contending that the duty to bargain collectively imposed by the NLRA required the employer to furnish this information, and that such information was necessary to administer the seniority provisions of the contract; the arbitrator ruled that he had no authority to pass on the first issue, since he was merely empowered to determine whether there had been a violation of the contract; he then found that there was no violation of the contract since the union, by agreeing that the employee himself would first take up the grievance with his supervisor, had given up its right to such information. See also *Borg-Warner Corp.*, 9 LA 901.

[13] To require that information pertinent to a grievance be submitted in advance of arbitration and to remedy a refusal to furnish such information as an unfair labor practice, does not unduly delay or complicate the grievance procedure. Cf. *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569, 578–579 (C.A. 5). To be sure, the present case has been in litigation for over two years. But that is because the Company has elected to contest its obligation to furnish the grievance information in advance of arbitration. Once that obligation has been established by the decision of this Court,

B. EVEN IF THE COMPANY HAD RAISED AN ISSUE OF CONTRACT INTERPRETATION IN DEFENDING ITS REFUSAL TO FURNISH INFORMATION, THE BOARD WOULD NOT HAVE BEEN PRECLUDED FROM DECIDING THE UNFAIR LABOR PRACTICE QUESTION

Even if the Company had based its refusal to furnish information in this case upon a contention—which it in fact did not make—that removal of machinery and subcontracting were left to its sole unilateral control by the contract, we submit that the Board could properly have found that refusal to constitute an unfair labor practice.

It is true that it might be urged in such a case that the Union's statutory right to the information requested would depend upon the correctness of the Company's view of the meaning of the collective bargaining agreement, a view which the Company might be deemed entitled to test in arbitration rather than before the Board. That is, it might be argued that the Union would have a right to the information as a predicate to considering the initiation or processing of grievances only if it would, in fact, have a right to initiate grievances over subcontracting or machinery removal. This right, in turn, would be present only if the contract did not leave subcontracting and machinery removal to the employer's unilateral control. Since the latter question—whether the Company does, indeed, have unilateral control over such matters—is a question of contract interpretation which an arbitrator would properly have to determine if a grievance over subcontracting or machinery removal were ultimately

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presumably very few employers will thereafter decline to furnish such information and the necessity for Board litigation will be obviated.

presented to him, the Company might argue that it should not be compelled by the Board to furnish the requested information until an arbitrator has decided the threshold question of interpretation. For, should it be determined in arbitration, contrary to the Board's decision, that the Company does have unilateral control under the contract, the Union would have had no statutory right to the information which the Board already had accorded it. On the other hand, if an arbitrator felt bound in interpreting the contract by the Board's contract interpretation in the earlier unfair labor practice proceeding, the Board would have usurped a function properly delegated to the arbitrator by the contract.

While, as this logic shows, there may well be cases where the Board may properly decline to require the production of information alleged to be irrelevant under the contract, we do not believe that the Board should, as a consequence, be held to be precluded in *all* cases from entertaining an unfair labor practice proceeding merely because an employer bases its refusal to supply requested information upon a contention that the information is not relevant under an asserted interpretation of the collective bargaining agreement.[19]

[19] This position was rejected in *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569 (C.A. 5), and *Square D Co.* v. *National Labor Relations Board*, 332 F. 2d 360 (C.A. 9), which hold that, at least where it is claimed by the employer that the matters complained of by the union have been left to the employer's unilateral control by the contract and

First, Section 10(a) of the Act (29 U.S.C. 160(a)) appears affirmatively to confer jurisdiction on the Board in these circumstances despite the possibility of an arbitral solution of the underlying contract dispute. That Section not only provides generally that "[t]he Board is empowered * * * to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title [Section 8 of the Act]) affecting commerce," but it also explicitly provides that "[*t*]*his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement*, law, or otherwise * * *" (emphasis added).

Second, just as in the situation described in the preceding section of this brief, where no arbitral question at all is raised, the exercise of Board power to vindicate a union's right to information prior to the institution of arbitration will often facilitate the arbitration process even when a contractual defense may be raised to the grievance claim. For example, the employer may seek to justify the discharge of an employee on the ground that it was for lack of work (a matter left to his unilateral control under the contract), while the employee may contend that the action was in fact motivated by other

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are not grievable, there is no obligation to furnish information until the arbitrator has determined the validity of that contract claim.

In *Hercules Motor Corp.*, 136 NLRB 1648, the Board (with Member Fanning dissenting) expressed a similar view. However, the Board has since confined that case to its particular facts. See *The Timken Roller Bearing Co.*, 138 NLRB 15, 16, n. 4, enforced, 325 F. 2d 746 (C.A. 6), certiorari denied, 376 U.S. 971; *Metropolitan Life Ins. Co.*, 150 NLRB 1478, 1479, n. 1.

considerations and was thus in violation of the provision of the contract barring discharge except for "just cause." See *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569 (C.A. 5). To permit the union to obtain information relating to the grievance in advance of arbitration in such a case would better enable it to assess the employer's contention that the subject matter of the grievance has been left to his unilateral control, and to determine whether to carry the problem to arbitration. Thus, where the employee has been discharged allegedly for lack of work, information with respect to the work load of the department and any newly-hired employees would help the union to determine whether lack of work was really the reason for the discharge. If the information tends to confirm the employer's contention, the union would be able to decide not to carry the employee's grievance to arbitration; on the other hand, if the information tends to cast doubt on the validity of the employer's asserted reason, the union might decide to proceed to arbitration, for, in these circumstances, there is a reasonable likelihood that it would be able to persuade an arbitrator that the discharge was not privileged under the clause relied on by the employer, but rather was in violation of the "just cause" clause. If the union cannot obtain information about work load, on the other hand, it will have no sound basis for evaluating the employee's claim; it makes little sense to require the union to press such a claim to arbitration before it is able to evaluate it.

Third, even though an arbitral issue relevant to the information claim is raised, the Board need not, in fact,

finally resolve such issues between the parties in determining the union's right to the information sought; hence no potential clash with the arbitrator's function of contract interpretation need actually be created by the Board's action. If the Board finds that the issue of contract interpretation raised by the employer is a substantial one, but that the union's contrary interpretation, under which the information requested would be relevant to its statutory functions, is also a substantial position, it may find that the information should be produced, not on the theory that the union is right, but on the ground that the union's position is tenable and has significant chance of ultimate success. In view of the strong interests favoring production of information should its relevancy ultimately be confirmed by an arbitral determination of the contract issues between the parties, the Board may justifiably believe in many cases that the purpose of the good faith bargaining requirement of the Act would better be served, on balance, by furnishing the union with information which might turn out to be irrelevant than by requiring the union to prosecute a possibly valid grievance without any of the necessary factual underpinning. This rule is not dissimilar to that applied in discovery procedures applicable in federal civil cases, when the court is called upon to require the production of information allegedly necessary for trial preparation. See *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2); *National Labor Relations Board* v. *Celotex Corp.* (C.A. 5), June 28, 1966, 66 LRRM 2475, 2477. Where the lack of relevancy of such informa-

tion is the ground for refusal to produce, the information may be withheld only if it plainly appears to be irrelevant; if colorable legal claims exist under which the information would be relevant, pre-trial production will be ordered despite the fact that the legal claims will not be determined until the hearing on the merits. See 4 Moore, *Federal Practice*, 1174–1175, 1181 (2d ed); *Garland* v. *Torre*, 259 F. 2d 545, 551 (C.A. 2), certiorari denied, 358 U.S. 910; *Kaiser-Frazer Corp.* v. *Otis & Co.*, 15 Fed. Rules Serv. 522, 525 (S.D.N.Y.)

Finally, there may also be a substantial number of cases where, although the employer formally relies upon a provision or provisions of the contract as a basis for its refusal to furnish information, its contract position is not, in fact, a substantial one.[20] Such a situation presents perhaps the strongest case for Board jurisdiction; the Board should obviously not be automatically precluded from requiring relevant information to be produced—thus seriously undermining the union's role as bargaining representative, merely because a "contract" defense is formulated by the employer, albeit the defense is a wholly insubstantial one which would be bound, ultimately, to fail in arbitration.[21]

We urge, in sum, that the mere existence of a collective bargaining agreement containing grievance

[20] The employer might, for example, purport to rely upon a general management prerogatives clause to defeat a request for information pursuant to specific contractual provisions such as those involved in this case.

[21] Cf. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, 585, holding that the mere existence of a management functions clause in the contract was not sufficient to establish that a grievance over subcontracting was not arbitrable.

and arbitration procedures should not be construed as totally foreclosing the Board's ordinary statutory power to determine whether a refusal to furnish relevant information constitutes a refusal to bargain in good faith under Section 8(a)(5) of the Act.[22] This seems especially true when—as in this case—the employer does not base his refusal to furnish the requested information upon any construction of the agreement which would be subject to arbitration. We believe we have also shown, however, that the Board's power should not be totally precluded even when the employer invokes a construction of the agreement as a reason for refusing the information. The exercise of Board power in such cases does not prevent or hinder arbitration, nor need the Board ordinarily determine any arbitral question of contract interpretation in reaching its decision. On the other hand, both the Act and the due administration of grievance and arbitration procedure contemplate that a union be afforded information necessary to enable it intelligently

[22] As suggested above, *supra*, p. 28, this is not to say that the Board will, in all cases, exercise its statutory power to require the production of information regardless of the nature and substantiality of the claim for nonproduction asserted by the employer. One example of such abstention might be where the employer's claim is not only that the requested information is irrelevant to a proper union grievance but that a clause of the contract specifically relating to the production of information accords the employer an affirmative privilege to refuse the union's request. If a substantial basis is presented for crediting the employer's claim of privilege, the Board may well hold in that situation that a balance of considerations counsels that production of the information should not be required until the union's right to the information is vindicated through arbitration.

to pursue the grievance and arbitration machinery, a right which the Board, alone, can effectively vindicate.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case remanded to the court of appeals with instructions to enforce the Board's order in full.

Respectfully submitted.

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AUGUST 1966.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449), as amended (29 U.S.C. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions

of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

The relevant provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) are as follows:

SEC. 203. (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * * * *

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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